

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 04-456

M. ELIZABETH NELSON,

Plaintiff and Appellant,

-VS-

ROBERT Y. NELSON,

Defendant and Respondent.

On Appeal from the Montana Sixteenth Judicial District Court, Custer County
Cause No. DV-98-21580

RESPONDENT'S BRIEF

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OF MONTANA

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STATEMENT OF FACTS

For purposes of this appeal, Appellee Robert Nelson does not have substantial disagreement with the Statement of Facts set out in Bette Nelson's Brief. Robert Nelson disagrees with the statement, on page 4 of the Brief, that in 1995 the "doctors suspected chemicals as the cause of those problems." The only person who has made a causal connection between chemicals applied at the Nelson Ranch and Bette Nelson's physical ailments is Dr. Richard A. Nelson of Billings. Robert Nelson also disagrees with those argumentative statements that he controlled all ranch operations, including application of chemicals.

The marriage between Bette Nelson and Robert Nelson was one which occurred later in life for both of them. Each had grown children and it was the third marriage for Robert Nelson and the fourth for Bette Nelson (Transcript, p. 315, ll. 3-15)

Bette Nelson had worked on a ranch during most of her life. (Transcript, p. 353, ll. 16-18) The land on which she and Robert Nelson lived during their marriage for six to eight years was owned by Robert, but Bette brought to the

relationship a certain amount of money, machinery, livestock, farm implements, and cows. (Transcript, pp. 323-24)

Approximately twelve years before the marriage, Robert Nelson had suffered a stroke, with the result that he did not have use of his right hand and his right leg was weak. (Transcript, p. 204, l. 15 to p. 205, l. 5; p. 149, l. 13 to p. 150, l. 10)

The chores on the ranch were shared between Robert and Bette, but it is clear that Bette Nelson handled the financial affairs of the ranch and wrote the checks. (Transcript, p. 166, ll. 13-16; p. 167, ll. 11-17; p. 182, ll. 15-22)

During the divorce process Bette Nelson was not pleased with her representation in the divorce, and was not pleased with the results of the divorce. (Transcript p. 358, ll. 10-13) Robert Nelson has maintained that this present litigation, begun shortly after the divorce proceedings, was merely an attempt to obtain a more favorable financial settlement than was provided to Bette Nelson by the divorce court.

During trial there was a dispute between Robert Nelson and Bette Nelson regarding the amount and intensity of herbicides and pesticides that were used on the ranch. Robert Nelson indicated that the spraying of sheep

occurred only twice during the marriage and that the process took less than a day. He testified that spray for weeds was used only one time, a process that lasted less than an hour. He testified that aerial spray was done by a third party, Lawrence Artz, who also sprayed the neighbor's crops in exactly the same fashion that the Nelson crops were sprayed. (Transcript, p. 206, l. 16 to p. 207, l. 19; p. 208, l. 9 to p. 209, ll. 9-13; p. 211, ll. 2-13) Bette Nelson, on the other hand, described a large amount of spraying activity conducted on ranch during the years she lived there. (Transcript, pp. 230-240)

SUMMARY OF ARGUMENT

First, the District Court was correct in granting Robert Nelson partial summary judgment regarding injuries sustained by Bette Nelson as a result of actions on the part of Merle Nelson, Robert's father. Bette Nelson presented absolutely no evidence to the District Court by which there could have been a duty on the part of Robert Nelson to control, supervise, or be responsible for acts of Merle Nelson.

Second, there was no error when the District Court concluded, following a motion in limine, that Plaintiff Bette Nelson would not be able to introduce evidence which would tend to show that Robert Nelson was responsible for any injury Bette Nelson received as a result of an injection of Ovine Ichthema

by Merle Nelson. This is essentially the same issue as the first issue presented by Appellant Bette Nelson. Additionally, there was no prejudice to Bette Nelson during trial as no evidence relating to the injection was refused by the District Court.

Third, the District Court properly excluded proposed expert testimony from Plaintiff Bette Nelson after there had been a complete failure by the Plaintiff to disclose the substance of the facts and opinions on which those experts were to testify, which disclosure was required both by the Montana Rules of Civil Procedure and by the District Court's Scheduling Order.

ARGUMENT

I. **The District Court Properly Granted Partial Summary Judgment to Robert Nelson Regarding Responsibility for an Injection of Ovine Icthemia Received by Plaintiff Bette Nelson.**

The District Court granted summary judgment to Defendant Robert Nelson regarding Bette Nelson's claim that Robert was somehow responsible for Merle Nelson having negligently injected Bette with Ovine Icthemia in 1989. In her Appellant's Brief, Bette Nelson mistakenly believes that the District Court decision was based upon a finding that a partnership existed between Robert and Bette Nelson. Bette Nelson asserts:

The false and misguided assumption made by the District Court that a partnership existed between

Robert Nelson, landowner, and Bette Nelson, wife of Robert, permitted the Court to improperly conclude that Merle Nelson, the man who negligently administered the Ovine Ichthema needle into Bette's hand, was not subject to Robert's supervision and that, therefore, evidence and testimony relating to actions of Merle could not be introduced.

(Appellant's Brief, p. 7)

That was not the basis for the District Court's decision, nor was it the basis of the Motion for Summary Judgment. Rather, the District Court's decision was based upon the absolute failure on the part of Bette Nelson to show any evidence upon which a duty to supervise could be based. The full decision of the District Court on that issue is the following:

Robert argues that he had no control over Merle and therefore no duty to supervise Merle, an essential element of a 'negligent supervision' claim. **Robert's arguments as to the law and facts were sufficient to shift the burden to Elizabeth to establish the existence of genuine issues of material fact.** (citations to briefs omitted) **No such showing was made.** Therefore, there are no genuine issues of material fact as to Robert's control of Merle. As a matter of law, Robert did not have a duty to supervise Merle and summary judgment is proper on this basis.

(District Court Order of Jan. 13, 2004, p. 5. l. 25 - p. 6, l. 3, Exh. No. 2, Appendix to Appellant Elizabeth Nelson's Brief, (emphasis added)).

In the District Court, Bette Nelson, in response to the Motion for Summary Judgment, failed to introduce any evidence whatsoever which

would tend to show a duty on the part of Robert Nelson to supervise Merle Nelson. (Plaintiff's Response to Def.'s Mot. for S.J. dated October 21, 2003, pp. 10-14)

Similarly, in her Appellant's Brief, before this Court, Bette Nelson has cited no evidence tending to show that Robert Nelson had any responsibility for the actions of Merle Nelson. In fact, the only evidence cited by Bette Nelson, on page 14 of Appellant's Brief, refers to trial testimony and not to any evidence which was before the District Court at the time of hearing the Motion for Summary Judgment.

Appellant Bette Nelson's Brief mistakenly equates the absence of a partnership between Bette and Robert with liability on the part of Robert for Merle Nelson's acts. Hence, the Appellant's Brief on this issue is essentially confined to the issue of existence of a partnership. As noted in their Brief: "By declaring and limiting the duty of Robert as it relates to Merle and Bette, the Court implicitly ruled that there was a partnership, and not a sole proprietorship and that Robert did not supervise Merle." (Appellant's Brief, p. 14)

The District Court did not rule that there was a partnership between Bette and Robert Nelson. In fact, the District Court specifically denied Robert Nelson's request to rule on that issue:

Robert's theory is that Robert had no duty to supervise Elizabeth because, as a matter of law, they operated the ranch as a partnership. However, even if this Court construes the claim as a 'negligent supervision' claim as argued by Robert, **whether or not a partnership exists in this case may not be determined as a matter of law.**

(District Court Order of Jan. 13, 2004 , p. 6, Exh. No. 2, Appendix to Appellant Elizabeth Nelson's Brief)

For some reason Appellant Bette Nelson maintains that Robert Nelson must prove the ranch was operated as a partnership in order to escape liability of Robert Nelson for acts committed by Merle Nelson. That was not the basis of Robert Nelson's Motion for Summary Judgment, and not the basis of the District Court's decision.

Although Defendant Robert Nelson had the initial burden, under Rule 56, M.R.Civ.P., to show that no genuine issue of material fact existed and that he was entitled to judgment as a matter of law, Rule 56 itself provides that once the movant had met that burden the burden shifts to the opposing party who opposes the motion:

When a Motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party

does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56 (e), Montana Rules of Civil Procedure.

Betty Nelson's argument before District Court on this issue consisted only of conclusory statements of counsel. This is not sufficient under Rule 56. Nor was the District Court required to anticipate possible evidence which might be produced at trial:

Parties cannot rely merely on allegations contained in their pleadings. Further, the trial judge is not required to anticipate possible proof at trial when ruling on a summary judgment motion.

Tucker v. Trotter Treadmills, Inc., 239 Mont. 233, 235, 779 P.2d 524, 525 (1989).

In McGinnis v. Hand, 1999 Mt. 9, 293 Mont. 72, 972 P.2d 1126, the plaintiff had filed a personal injury lawsuit against, among others, a mother of a teenage girl who was in a car which allegedly caused personal injury to the plaintiff during a high-speed chase. Plaintiff alleged that the mother had power over her daughter and power to prevent the use of the vehicle by her daughter, and that the mother was therefore liable for plaintiff's injuries. Plaintiff submitted an affidavit regarding authority to use and permission to

use the vehicle, but the Supreme Court agreed with the court below that the affidavit did not set forth facts which raised a genuine issue of material fact:

Furthermore, the statement in McGinnis's affidavit that "(e)very aspect of (his) investigation revealed" that Danielle was using the vehicle with Pamela's knowledge and permission does not raise a genuine issue of material fact. The party opposing summary judgment must come forward with evidence of a substantial nature; mere denial, speculation, or conclusory statements are not sufficient.

McGinnis v. Hand at ¶ 18, 293 Mont. at 77, 972 P.2d at 1130.

It is basic tort law that in order to recover for personal injuries, a claimant must establish a legal duty, a breach of that duty, and damages. Estate of Streaver v. Cline, 278 Mont. 165, 171; 924 P.2d 666, 669 (1996). The District Court had before it, at the time of its decision, testimony from Bette Nelson indicating that Merle Nelson was neither hired by Robert Nelson nor under Robert Nelson's supervision. (See, Defendant's Brief in Support of Summary Judgment, dated Oct. 10, 2003, pp. 9-10) Bette Nelson presented no evidence that Robert Nelson failed to exercise ordinary care. The District Court correctly determined that Plaintiff Bette Nelson had never presented any facts which established a duty on the part of Robert Nelson to be responsible for anything Merle Nelson might have done. The conclusory statements in the briefs of Bette Nelson do not suffice.

II. The District Court Properly Excluded Evidence Relating to Responsibility of Defendant Robert Nelson for Injuries Received by Plaintiff Bette Nelson as a Result of any Injection of Ovine Ichthema.

This is essentially the same as the first Issue presented by Appellant. As indicated above, the District Court was correct in it's ruling that Defendant Robert Nelson was entitled to summary judgment with regard to the claims made by Bette Nelson alleging injuries from an injection of Ovine Ichthema allegedly administered by Merle Nelson in 1989. The subsequent Motion in Limine was merely to prevent Bette Nelson from testifying that Robert Nelson was responsible for any injury inflicted upon her by Merle Nelson. This ruling on evidence was a corollary to the District Court's prior ruling regarding the failure on the part of Bette Nelson to show any duty of Robert Nelson to control Merle Nelson's actions.

A trial court has inherent power to admit or deny evidence in order to assure fair trial:

The District Court granted the fire department's motion in limine which prohibited Jacobs and Coates from alleging that the fire department had a duty to regulate traffic. The authority to grant or deny a motion in limine is part of the inherent power over court to admit to exclude evidence in order to assure a fair trial. (Citation omitted.) With this principle in mind, we will not overturn a district court's order in limine absent an abuse of discretion.

Jacobs v. Laurel Volunteer Department, 2001 Mt. 98, ¶ 12; 305 Mont. 225, 228; 26 P.3d 730-732.

It is clear from discussion at the beginning of trial that the parties were aware that evidence of Bette Nelson's injection in 1989 would come out during trial, but that the evidence to be excluded was that which would make Robert Nelson responsible for the injection:

MR. CROMLEY: Although, it doesn't apply to the proceeding we're going to go to now, although we move to exclude reference to the negligence with regard to the injection, there is no doubt that that topic will come in because it's another thing she suffered just a -- you know, it's in her medical history.

MR. LaFOUNTAIN: Our intent is to keep that out to the extent that we can. With respect to that there is an -- some exhibits from Dr. Nelson and Marla Malley and what I have done is presented a duplicate copy, one with and one without the blackening. And they may object to the blackening, and if they do then I'll be forced to put it in with. It talks in detail about ovine, but without the blackening -- if you have a chance to look at it with the black, it's all out of there. I think --

MR. CROMLEY: It's in her history and it's part of her medical history. That's part of the case, obviously, when in doubt in terms of Bob's responsibility for it.

MR. LaFOUNTAIN: With respect to the blackening, you don't want the blackening?

MR. CROMLEY: No, I don't.

MR. LaFOUNTAIN: I'll go in with it. I'll try to limit it. It opens the door for a possible, I suppose, objection and mistrial later. I think I can avoid all that.

MR. CROMLEY: What we're primarily, wanting to avoid is Bob's responsibility for the injection.

Mr. LaFOUNTAIN: I understand.

(Transcript, p. 11, l. 10 to p. 12, l. 13)

Bette Nelson's injection of Ovine Ichthema was referred to extensively in exhibits proposed by her attorney during trial. Additionally, Bette Nelson herself, in testifying regarding the various illnesses from which she suffers, discussed the injection and its relation to her medical history on multiple occasions. (Transcript, p. 325, l. 24 to p. 326, l. 13; p. 331, l. 21 to p. 332, l. 6; p. 339, l. 14 to p. 340, l. 18; p. 353, ll. 6-15)

Bette Nelson's Brief fails to mention any evidence offered by her at trial which was refused by the District Court. The District Court's Order in Limine was proper, and Bette Nelson suffered no prejudice.

III. The District Court Properly Excluded Expert Testimony Offered by Plaintiff Bette Nelson Following the Failure on the Part of Bette Nelson to Disclose the Substance of the Facts and Opinions Upon Which the Experts were Expected to Testify.

Plaintiff Bette Nelson had ample opportunity throughout the long history of this case to properly disclose the bases for her experts' opinions according

to the requirements of Rule 26(b)(4)(A)(i). Essentially she has had the same experts since the filing of the original Complaint in May, 1998. The Scheduling Order issued by the District Court specifically called for full disclosure under Rule 26, stating that by the deadline, "parties must simultaneously exchange expert witness lists, together with the information described in M.R.Civ.P. 26(b)(4)(A)(i)." (District Court Scheduling Order of October 22, 2002, pgs. 1-2)

By stipulation, the deadline for expert disclosures was extended to June 2, 2003 (District Court's Order Granting Extension of Discovery and Expert Disclosure Deadlines dated April 29, 2003). Bette Nelson filed her expert disclosure several days late. (Exh. No. 8, App. to Appellant Elizabeth Nelson's Brief) In some courts, the tardiness alone would have been sufficient to exclude the two expert witnesses listed. However, the tardiness of the disclosure was never made an issue by Robert Nelson.

The Expert Disclosure of Bette Nelson completely fails to satisfy the requirements of Rule 26. With regard to Dr. Richard Nelson, the Disclosure document failed to disclose the substance of the facts and opinions to which Dr. Nelson was expected to testify. The Disclosure was totally void of any facts of how Dr. Nelson arrived at his opinion with regard to exposure to the

chemicals, none of which are named. This Disclosure failed to set forth any research or bases upon which Dr. Nelson relied.

Similarly, the Disclosure document, in its identification of Dr. Bruce R. Swarny, completely fails to satisfy the requirements of Rule 26. The Disclosure is void of any facts or actual opinions as to what Dr. Swarny will testify to. It does not indicate what the medical problems of Bette Nelson may be, how these medical problems equate to herbicides, pesticides, and insecticides, and the nature of any symptoms exhibited by Bette Nelson or the grounds for opinions.

Regarding both physicians named in the Disclosure document, only the conclusory statement is made that "Plaintiff's injuries and illnesses were caused by exposure to pesticides, herbicides, and insecticides or other ranch related chemicals and by inoculation with the live virus (Ovine Ichthema)." (Plaintiff's Disclosure of Experts, p. 1, Exh. No. 8, Appendix to Appellant Elizabeth Nelson's Brief) In light of the fact that Robert Nelson's responsibility for the inoculation of the virus had been removed from the case, even the conclusion is flawed in terms of admissibility because it fails to distinguish any causal relationship between the illnesses and the pesticides and herbicides.

Surprisingly, Appellant Bette Nelson has attached copies of medical reports from her two experts, Richard A. Nelson, M.D. and Bruce R. Swarny, M.D. (Exh. Nos. 4 and 5, Appendix to Appellant Elizabeth Nelson's Brief, respectively). These exhibits prove exactly that Bette Nelson, despite continuing requests for additional details and bases for opinions, never produced anything upon which a causal connection could be made between Bette Nelson's multiple health problems and any exposure to pesticides and herbicides. Not only was there failure to set forth a "summary of the grounds for each opinion", there was a failure to set forth the "substance of the facts and opinions" themselves. For example, Dr. Richard A. Nelson's reports of November 4, 1996; April 17, 1997; and June 1, 1997 do not even mention pesticides and herbicides, but only discuss Bette Nelson's possible exposure to the vaccination in 1989. His latest report, dated December 9, 1997 discusses the relationship between the injection and Bette Nelson's illnesses, and specifically excludes any opinions regarding exposure to pesticides and herbicides.

With all of those in mind any and all of them can be aggravated by the exposure to any agents that are biologically active as ovina ictha but most especially lung and membranes and skin. The pesticides and herbicides would have bothered her nervous system and immune system but they have not been worked

up to the extent we would know whether that is the case or not. We have to do some very special testing of the nervous system such as PET scans, neuropsychological, P300s, etc.

(Exh. No. 4, Appendix to Appellant Elizabeth Nelson's Brief, Nelson letter dated December 9, 1997, pgs. 1-2, (emphasis added))

Similarly, the two reports submitted by Bette Nelson from her Glendive physician, Bruce R. Swarny, M.D., related only to her alleged exposure to a live virus vaccine in 1989 and do not even mention her exposure to pesticides and herbicides. (Exh. No. 5, Appendix to Appellant Elizabeth Nelson's Brief)

No specific chemical is referred to by either Dr. Richard Nelson or Dr. Bruce Swarny in any of their reports or disclosures.

This Court has recently summarized the discretion given to the trial court in ruling on admissibility of expert testimony:

We review a court's rulings on the admissibility of evidence to determine whether the court abused its discretion. State v. Bingman, 2002 MT 350, ¶ 19, 313 Mont. 376, ¶ 19, 61 P.3d 153, ¶ 19 (citation omitted). Absent a showing of such abuse we will not overturn a district court's decision. Bingman, ¶ 19. Moreover, "the trial court is vested with **great latitude in ruling on the admissibility of expert testimony.**" Baldauf v. Arrow Tank and Engineering, 1999 MT 81, ¶ 22, 294 Mont. 107, ¶ 22, 979 P.2d 166, ¶ 22 (**emphasis in original**) (citation omitted).

Christopherson v. City of Great Falls, 2003 MT 189, ¶ 8; 316 Mont. 469, 472-73, 74 P.3d 1021, 1024.

This Court has, on a number of occasions, affirmed the authority of a District Court to exclude expert testimony. For example, in Seal v. Woodrows Pharmacy, 1999 Mt. 247, 296 Mont. 197, 988 P.2d 1230, the following summary appears:

In Seal's list of expert witnesses filed on March 2, 1998, Dr. Cocozzo was included as an expert medical witness. As stated previously, however, this list did not include the required Rule 26(b)(4)(A)(i), M.R.Civ.P., information. It stated only Dr. Cocozzo's name, address and qualifications. In a supplement to his expert witness list, Seal added that "Dr. Cocozzo's position is that the standard of care for pain management was not met in this matter, and that the controlled substances prescribed by Dr. D.G.H. were excessive." This did not comply with the District Court's order and Rule 26(b)(4)(A)(i), M.R.Civ.P., either. Seal did not state the substance of the facts and opinions to which Dr. Cocozzo would testify or a summary of the grounds for Dr. Cocozzo's opinion. In addition, the supplement was not timely filed and served. Although Seal subsequently served more information about Dr. Cocozzo's proposed testimony, he did not file it with the District Court. As a result of these violations, the District Court prohibited Seal from introducing Dr. Cocozzo's expert testimony into evidence.

¶ 20; 296 Mont. at 201, 988 P.2d at 1232.

In response to Seal's argument that the opposing party had the duty to ask questions about the expert witness's opinion foundation, this Court noted that such an argument "ignores the fact that the District Court's scheduling order

required him to provide such information.” Id., at ¶ 23; 296 Mont. at 202, 988 P.2d at 1233.

Most of the cases cited by Appellant Bette Nelson affirmed the discretionary authority given to District Courts. The decision of District Courts to allow expert testimony, over objection, was affirmed in the following three cases cited by Appellant: Morning Star Enterprises v. R. H. Grover, 247 Mont. 105, 805 P.2d 553 (1990); Mason v. Ditzel, 255 Mont. 364, 842 P.2d 707 (1992); Scott v. E. I. DuPont De Nemours & Co., 240 Mont. 282, 783 P.2d 938 (1989).

Appellant Bette Nelson’s Brief also cites Hawkins v. Harney, 2003 Mt. 58, 314 Mont. 384, 66 P.3d 305. However, that case was not decided by the trial court on the basis of disclosure, but on the basis on inadequate responses to discovery. The case had not even been set for trial.

On page 23 of her Brief, Appellant Bette Nelson argues that the District Court’s “proper recourse may have been a continuance to allow (Robert Nelson) additional time to prepare for what he began on the day of trial claiming was undisclosed expert witnesses.” However, Appellant Bette Nelson did not request a continuance at trial, nor was one refused.

CONCLUSION

The decisions of the District Court regarding partial summary judgment and exclusion of expert testimony were correct, and those rulings should be affirmed.

Respectfully submitted this 17 day of September, 2004.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing document was served upon the following by U.S. mail, postage prepaid, at Billings, Montana, on this 17 day of September, 2004.

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MOULTON, BELLINGHAM, LONGO
& MATHER, P.C.

By

A handwritten signature in dark ink, appearing to read 'R. E. LaFountain', is written over a horizontal line.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is double-spaced, is in Arial 14 point type, and contains 4,142 words, excluding Table of Contents, Table of Authorities, title page, signature, certificate of service and certificate of compliance.

DATED this 17 day of September, 2004.

A handwritten signature in cursive script, appearing to read "P. C.", is written over a horizontal line.